86-570

No.

Supreme Court, U.S.
FILED
OCT 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

COUNTY OF FRESNO, FRESNO COUNTY BOARD OF SUPERVISORS,
ALLAN COLMAN, JAMES EDMUNDS,
DONALD ROWE and DONN COBB,
Petitioners,

VS.

SUPERIOR COURT OF THE COUNTY OF FRESNO,
Respondent,
ANGELA SHARON MOTSENBOCKER,
Real Party in Interest.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

FRANK D. MAUL
(Counsel of Record)
DANIEL O. JAMISON
MICHAEL P. MALLERY
STAMMER, MCKNIGHT,
BARNUM & BAILEY
2011 Fresno Street, Suite 305
Fresno, CA 93721
(209) 266-0457
Attorneys for Petitioner

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

25 pp

QUESTION PRESENTED

Should the United States Supreme Court decision in *Wilson v. Garcia* (1985) 85 L.Ed.2d. 254, 105 S.Ct. 1938, mandating that the statute of limitations for personal injury actions in each state is the applicable statute for all 1983 claims nationwide, be applied retroactively in all cases?

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COUNTY OF FRESNO, FRESNO COUNTY BOARD OF SUPERVISORS, ALLAN COLMAN, JAMES EDMUNDS, DONALD ROWE and DONN COBB,
Petitioners,

VS.

SUPERIOR COURT OF THE COUNTY OF FRESNO,
Respondent,
ANGELA SHARON MOTSENBOCKER,
Real Party in Interest.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

The petitioners, County of Fresno, Fresno County Board of Supervisors, Allan Colman, James Edmunds, Donald Rowe and Donn Cobb, respectfully pray that a writ of certiorari issue to review the order of the Supreme Court of the State of California dated July 9, 1986, denying review after judgment by the California Court of Appeal, Fifth Appellate District.

OPINIONS BELOW

The Order of the Supreme Court of the State of California denying review of the judgment of the Court of Appeal, Fifth

Appellate District of the State of California, the opinion of that Court of Appeal, the order of that Court of Appeal to the Superior Court of the County of Fresno to show cause and the decision of the Superior Court of the State of California in and for the County of Fresno overruling petitioner's demurrer to plaintiff's complaint appear in the Appendix hereto.

JURISDICTION

The Order of the Supreme Court of the State of California denying review of the judgment of the Court of Appeal of the State of California, Fifth Appellate District, was filed on July 9, 1986. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

STATUTORY PROVISIONS INVOLVED

CIVIL RIGHTS 42 U.S.C. Section 1983. Civil action for deprivation of rights.

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

Plaintiff's (Real Party in Interest's) State Court Complaint alleges two causes of action, both of which seek relief under 42 U.S.C. Section 1983 for conduct alleged to have occurred between July 1, 1982, and August 19, 1983. The first cause of action alleges that petitioners conspired to and did wrongfully terminate her from her position as administrative secretary. The second

cause of action alleges that petitioners Colman, Edmunds, Rowe and Cobb engaged in an outrageous and concerted course of conduct with the intent to harrass, humiliate, and intimidate real party in interest into leaving her county employment. This complaint was filed on April 23, 1985. On July 27, 1985, petitioners filed and served their demurrer to real party in interest's complaint contending that the applicable statute of limitations in California for Section 1983 causes of action is one year pursuant to the decision in *Wilson vs. Garcia.* It was petitioner's position that the *Wilson vs. Garcia* decision is retroactive, and therefore barred plaintiff's action. Real party in interest served her opposition Points and Authorities to petitioners' demurrer on August 9, 1985. Petitioner served the reply Points and Authorities on September 20, 1985. The hearing on the demurrer was held on September 24, 1985, and the Honorable Dwayne Keyes overruled the demurrer on that date. Judge Keyes' written order overruling the demurrer was filed on October 14, 1985, and notice of the same was served by real party in interest on October 4, 1985.

On May 20, 1985, within the time allowed by law, petitioners filed with the Court of Appeal, Fifth Appellate District, in the State of California, their Petition for Writ of Mandamus, Prohibition, or Other Appropriate Writ, supporting Memorandum of Points and Authorities and Appendix. Petitioners prayed for issuance of an alternative Writ of Mandamus, Prohibition, and/or Other Appropriate Writ commanding the respondent Superior Court to vacate its order overruling the demurrer and enter an order granting the same, or in the alternative, to show cause why it had not been done and why a peremptory writ should not issue. Petitioners further prayed that at the hearing of the petition, the Appellate Court issue a peremptory writ commanding the respondent Superior Court to vacate its order overruling the demurrer and enter an order granting same. Petitioners also prayed for costs and such other and further relief as the court deemed proper.

In the Court of Appeal, petitioners continued to contend that *Wilson vs. Garcia* should be applied retroactively to bar the State court action. On December 9, 1985, real party in interest served by mail its opposition to the petition contending that *Wilson vs. Garcia* should not be applied retroactively. On December 9, 1985,

the Court of Appeal issued an order to show cause which was filed on December 12, 1985. On January 9, 1986, petitioners filed and served their reply to the real party in interest's opposition. Oral arguments on the petition were heard on March 17, 1986.

On April 4, 1986, the Court of Appeal filed its written opinion denying petitioner's writ and ordered that real party should recover from petitioners the costs incurred in the proceedings on the writ. The Court of Appeal decision holds that *Wilson vs. Garcia* should be "applied prospectively to avoid the inequitable result of barring real party's section 1983 claims which were filed timely under the law in effect when the underlying acts occurred."

Thereafter, on May 13, 1986, petitioners timely filed a petition to the Supreme Court of the State of California to review the judgment and decision by the Court of Appeal. Petitioners received real party in interests' answer to this petition for review on May 23, 1986.

On July 9, 1986, the Supreme Court of the State of California filed and served its order denying review of the judgment of the Court of Appeal.

This petition for Writ of Certiorari followed.

ARGUMENT

I

IMPORTANT QUESTIONS OF FEDERAL LAW MUST BE SETTLED BY THE UNITED STATES SUPREME COURT

A. Nationwide conflict exists regarding whether the United States Supreme Court decision of Wilson vs. Garcia should have retroactive effect

Since the United States Supreme Court decision in *Wilson vs. Garcia*, (1985) 85 L.Ed. 2d 254, 105 S.Ct. 1938, which held that an action brought under 42 U.S.C. Section 1983 should be considered a personal injury action for purposes of borrowing an appropriate statute of limitation, there has been nationwide conflict as to whether the decision should be given retroactive effect.

For instance, the Sixth Circuit Court of Appeals decision of *Mulligan vs. Hazard*, (1985) 77 F. 2d 340, holds, without qualification, that the *Wilson* decision should be given retroactive effect. The court in *Mulligan* states as follows at page 343:

> "The Supreme Court did not address the issue of whether the decision of *Wilson vs. Garcia* should be applied retroactively to cases already filed but not decided prior to *Wilson*. However, the court, itself, applied its holding retroactively in the *Wilson* case by upholding the U.S. Court of Appeals decision to apply New Mexico's statute of limitations for personal injury actions in lieu of another statute which the New Mexico Supreme Court had earlier held was applicable to a factually similar Section 1983 action and which would have barred the plaintiff from prosecuting his law suit. . . . [W]ilson implicitly mandates that its' holding be applied retroactively."

The Court of Appeals for the Fifth and Eleventh Circuits have reached similar results. See *Gates vs. Spinks*, (5th Cir. 1985) 771 F.2d 916; *Jones vs. Pruit and Mauldin*, (11th Cir. 1985) 763 F.2d 1250.

The 9th and 10th Circuits, however, have determined that when retroactive application would shorten the statute of limitations, *Wilson* merits only prospective relief. See *Gibson vs. United States*, (9th Cir. 1986) 781 F.2d 1334; *Jackson vs. City of Bloomfield*, (10th Cir. 1984) 731 F.2d 652.

Finally, the 3rd and 8th Circuits have applied *Wilson* retroactively in certain cases, but it is unclear whether their holdings are designed to have universal application. See *Wycoff vs. Menkee*, (8th Cir. 1985) 773 F.2d 983, 986-987; *Fitzgerald vs. Larson*, (3rd Cir. 1985) 769 F.2d 160, 162-164; *Smith vs. City of Pittsburgh*, (3rd Cir. 1985) 764 F.2d 188, 194-196.

Given this current confusion, and the unlikely prospect that this confusion will disappear without guidance from the United States Supreme Court, the present appears to be the proper time for the United States Supreme Court to grant this Writ of Certiorari to review the issue of retroactive application of *Wilson vs. Garcia*.

B. Wilson vs. Garcia should be applied retroactively in all cases nationwide

As demonstrated above, *Wilson* implicitly requires a retroactive application by the very terms of its decision. However, in the instant case, the California Court of Appeal relied upon another California Court of Appeal decision, *Parker vs. Superior Court*, (1985) 175 Cal.App.3d 1082, and the 9th Circuit decision of *Gibson, supra*, in holding that *Wilson* should be applied prospectively in the subject case. The courts in both *Parker* and *Gibson* purport to apply the test set forth in *Chevron Oil Company vs. Huson*, (1971) 404 U.S. 97, to determine the retroactivity issue. In *Chevron*, this Court stated that three separate factors must be considered in deciding whether a decision is to be applied retroactively. Those factors are as follows: (1) Whether the decision establishes a new principle of law; (2) Whether retroactive application will further or retard the purposes of the rule adopted; and (3) Whether the decision could produce substantial inequitable results if applied retroactively.

In *Parker, Gibson*, and the subject case, the reviewing court analyzed the *Chevron* factors in view of the specific facts as they related to the specific plaintiff and held that prospective application would be appropriate so as not to bar the claims in those cases. The analysis used by these courts requires a case-by-case examination in each state and/or circuit to determine whether a particular plaintiff has a claim revived or barred. The analysis depends on the status of precedent in each state and on whether applying the new decision will result in substantial inequitable results in that state and in that particular case. This form of analysis, if adopted nationwide, will undoubtedly result in innumerable determinations in each of the 50 states and the Circuit Courts of Appeals. Because of the unlimited number of slight factual variations in the circumstances of each plaintiff's case, many of these determinations are likely to be contradictory on similar facts. The result will most certainly be the greatest confusion and uncertainty in Section 1983 cases since that which pre-dated the *Wilson* decision.

It was this very confusion that this Court in the *Wilson* decision attempted to eliminate by holding that the applicable statute of

limitation period for Section 1983 claims would be the personal injury limitation period found in the particular state.

Not only is the confusion apparent on a nationwide basis, but it is also apparent in the conflicting opinions found in the 9th Circuit Court of Appeal decision of *Rivera vs. Green*, (1985) 775 F.2d 1384, wherein the court held that *Wilson* should be held retroactive for civil rights claims arising in Arizona, and in the California Court of Appeals decision in the subject case holding that there should be prospective application.

Fortunately, *Wilson* not only implicitly holds retroactivity should be the rule, but also provides additional guidance at pages 1946 and 1947 as follows:

> "If the choice of the Statute of Limitations were to depend upon the particular facts of the precise legal theory of each claim, counsel could almost always argue, with considerable force, that two or more periods of limitation should apply to each Section 1983 claim. Moreover, under such an approach different Statutes of Limitations would be applied to the various Section 1983 claims arising in the same State, and multiple periods of Limitations would often apply to the same case. There is no reason to believe that Congress would have sanctioned this interpretation of its Statute.
>
> "When Section 1983 was enacted, it is unlikely that Congress actually foresaw the wide diversity of claims that the new remedy would ultimately embrace. The simplicity of the admonition in Section 1988 is consistent with the assumption that Congress intended the identification of the appropriate Statute of Limitations to be an uncomplicated task for judges, lawyers and litigants, rather than a source of uncertainty, and unproductive and ever increasing litigation. Moreover, the legislative purpose to create an effective remedy for the enforcement of federal Civil Rights is obstructed by uncertainty in the applicable Statute of Limitations, for scarce resources must be dissipated by useless litigation on collateral matters."

See also *Simpson v. Director of Office of Workers' Compensation*, (1982 1st Cir.) 681 F.2d 81. Therefore, given the goal of

Wilson to simplify what was the needlessly complex task of determining the appropriate statute of limitations in each state, it would be entirely inconsistent with the *Wilson* decision for the retroactivity question to be determined on a case-by-case, state-by-state, circuit-by-circuit basis. Given the apparent holding of *Wilson* and its call for uniformity, it is clear that the United States Supreme Court needs to settle the conflict amongst the circuits and the states regarding the retroactive application of the *Wilson* decision.

In addition, a holding that *Wilson* is retroactive nationwide is no more likely on the whole to cause greater injustice than a nationwide holding that *Wilson* is prospective. For example, in *Wilson*, the court considered the question of what statute of limitation should be applied to a civil rights action brought in New Mexico. Prior to the *Wilson* decision, the New Mexico Supreme Court decided this question in *DeVargas vs. New Mexico*, (1982) 97 N.M. 563. In *DeVargas*, the plaintiff filed suit under the Civil Rights Act more than two years, but less than three years, after the alleged personal injury. The New Mexico Supreme Court determined that the applicable statute of limitations to the civil rights action was a two year statute of limitations under the New Mexico Tort Claims Act. The State Court rejected plaintiff's argument that the three year statute of limitations for personal injuries should be applied. *DeVargas* was thus barred from proceeding with his action. Subsequently, the Supreme Court in *Wilson* specifically disapproved the *DeVargas* decision and mandated that the statute of limitations for personal injuries should be applied in the Civil Rights Act actions. To deny *Wilson* retroactive effect would be to deny DeVargas and innumerable similarly situated plaintiffs their day in court. In addition, theoretically, prospective application of *Wilson* would bar a plaintiff who relied upon the *Wilson* decision in believing that the statute of limitations period had been lengthened and failed to file within the period applicable to his pre-*Wilson* Section 1983 cause of action when it arose.

Whether the rule is prospective or retroactive in application, there will be both plaintiffs and defendants who are unhappy. There can be no question, however, that the principles that lead to

the *Wilson* decision mandate that one or the other be selected for the nation as a whole. Given the present erroneous case-by-case analysis being used in the State of California, it is imperative that the United States Supreme Court grant this Petition for Writ of Certiorari in order to settle the issue and determine that there is but one nationwide standard.

Moreover, the granting of review is particularly imperative because applicable principles of law require that *Wilson* be retroactive. First, retroactive application of judicial decisions of Federal Courts is the rule, not the exception, and there is a strong presumption in favor of retroactivity. *Robinson v. O'Neil*, (1973) 409 U.S. 505, 507-508, 35 L.Ed.2d. 29, 93 S.Ct. 876, 877-878; *Simpson v. Director of Office and Workers' Compensation Programs*, (1982 1st Cir.) 681 F.2d 81, 84. Second, appropriate analysis under the *Chevron* decision compels a finding that the *Wilson* decision should be applied retroactively. Specifically, as the *Wilson* decision points out, there is no clear past precedent of the United States Supreme Court as to the appropriate statute of limitations period for Section 1983 claims. See *Wilson, supra*, 105 S.Ct. at 1942. In applying the *Chevron* test, the appropriate initial question is whether there is a clear past precedent of the United States Supreme Court which was overruled, not just any other court. See *Perez v. Dayna Corporation*, (1983 3rd. Cir.) 718 F.2d 581; *C. F. Jackson vs. Bloomfield*, (1984 10th Cir.) 731 F.2d 652; *Abbitt v. Franklin*, (1984 10th Cir.) 731 F.2d 661; *EEOC vs. Gaddis* (1984 10th Cir.) 733 F.2d 1373.

Finally, the Court of Appeal decision in the instant case suggests or implies that *Wilson* should be applied retroactively when it revives claims but not when it bars one. There is nothing in 42 U.S.C. Section 1983 or 1988, however, which would suggest such an approach. Section 1983 and 1988 simply do not dictate this conclusion: they mandate only that the period of limitations not be fixed in a way that discriminates against federal claims or that is otherwise inconsistent with federal law. See *Wilson* at page 1949. The case-by-case approach suggested by the Court of Appeal decision herein invites the potential for rulings which may have a discriminatory effect on the maintenance of Section 1983 actions. As explained in the *Wilson* decision, the historical pur-

pose of the Civil Rights Act was to protect those citizens in the South who were being denied their civil and political rights by the campaign of violence and deception occurring in the South. Congress enacted a national statute due to the ineffectiveness of state remedies for the protection of those citizens' civil rights. See *Wilson, supra*, at page 1947. Thereafter, the *Wilson* decision set forth a national decision as to the applicable statute of limitations period due to the federal interest in uniformity, certainty and minimization of unnecessary litigation. If State and Federal trial courts can declare *Wilson* retroactive or prospective on a case-by-case basis, according to any perceived factual distinction of a case, the potential for discriminatory application of *Wilson* is manifest.

CONCLUSION

Justice White, with whom Justice Marshall joined, wrote in dissent regarding the denial of the Petition of Writ of Certiorari in the case of *Mulligan vs. Hazard*, (1986) 106 S.Ct. 2902, as follows:

> "The Court's decision not to review the instant case marks the third time this term that it has refused to address these differences that exist between the Courts of Appeals; differences that are not likely to disappear without guidance from this court. Given the square conflicts among the circuits, and the frequency with which these cases arise, I would grant the Petition for Certiorari in this case."

Given the interest of federal law in nationwide simplicity and uniformity on the applicable statute of limitations, it can only be concluded that *Wilson* should be retroactive nationwide. If retroactivity is determined on a case-by-case basis, then simplicity and uniformity will be lost. Given the enormous variety of state and federal rulings on similar facts that case-by-case determinations will allow, the goals of avoiding discrimination against civil rights claims and of maintaining consistency with federal law are obviously jeopardized. Given the Court of Appeal's use of a case-by-case analysis and its apparent disregard of the dictates of the *Wilson* decision, there are important questions of law which the United States Supreme Court must settle with respect to whether

the *Wilson vs. Garcia* decision should be applied retroactively nationwide.

Therefore, it is respectively requested that this court grant this Petition for Writ of Certiorari in this case and thereafter reverse the judgment denying Petitioner's Writ of Mandate in State Court.

DATED: October 6, 1986.

STAMMER, MCKNIGHT,
BARNUM & BAILEY

By: FRANK D. MAUL

(Appendices follow)

Appendix A

Order Denying Review
After Judgment by the Court of Appeal
5th District, No. F006411

In the Supreme Court of the State of California

In Bank

[Filed July 9, 1986]

County of Fresno et al.,
Petitioners,

v.

Superior Court of the County of Fresno,
Respondent;

Mostenbocker,
Real Party in Interest.

Petitioners' petition for review DENIED.

BIRD
Chief Justice

Appendix B

Not to be Published in Official Reports

In the Court of Appeal of the State of California
Fifth Appellate District
5 Civil No. F006411

County of Fresno et al.,
Petitioners,

v.

The Superior Court of Fresno County,
Respondent;

Angela Sharon Motsenbocker,
Real party in Interest.

[Filed April 4, 1986]

Original Proceeding; petition for a writ of mandate.

Stammer, McKnight, Barnum & Bailey, Daniel O. Jamison, Mark W. Lester and Michael P. Mallery for Petitioners.

No appearance for Respondent.

Bennett & Sharpe and Katherine Hart for Real party in Interest.

* * *

Petitioners County of Fresno, Fresno County Board of Supervisors, Allan Colman, James Edmunds, Donald Rowe and Don Cobb seek a writ of mandate directing respondent Fresno County Superior Court to vacate its order overruling petitioners' demurrer and enter an order sustaining that demurrer.

Angela Sharon Motsenbocker, real party in interest, is the plaintiff in a civil rights action filed on April 23, 1985, in respondent court, based on conduct occurring between July 1, 1982, and August 19, 1983. The issue presented is whether the United States Supreme Court's decision in *Wilson v. Garcia* (1985) ___ U.S. ___ [85 L. Ed.2d 254, 105 S.Ct. 1938] [the statute of limitations for personal injury actions in each state is

the appropriate statute for all section 1983 claims[1]] should be applied retroactively. In reliance on *Parker v. Superior Court* (1985) 175 Cal.App.3d 1082 and *Gibson v. United States* (9th Cir. 1986) 781 F.2d 1334, we conclude that the rule of *Wilson v. Garcia* should be applied prospectively to avoid the inequitable result of barring real party's section 1983 claims which were timely filed under the law in effect when the underlying acts occurred. We will deny the writ.

DISCUSSION

The federal statute governing civil rights claims (§ 1983) does not contain a specific statute of limitations. Instead, section 1988 empowers courts having jurisdiction to select the state limitations statute most appropriate to apply to section 1983 claims. (See *Wilson v. Garcia, supra,* ____ U.S. at p. ____[105 S.Ct. at p. 1942].) Until *Wilson v. Garcia, supra,* the courts had applied to section 1983 actions arising in California and to be tried here the three-year statute of limitations for an "action upon a liability created by statute" specified in Code of Civil Procedure section 338, subdivision 1. (*Donovan v. Reinbold* (9th Cir. 1970) 433 F.2d 738; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706.)

In *Wilson v. Garcia, supra,* ____ U.S. ____the Supreme Court concluded first that section 1988 directs that the characterization of a section 1983 claim for statute of limitations purposes should be treated as a federal question. It then held that the state statute of limitations for tort actions for the recovery of damages for personal injuries is most appropriate to apply to section 1983 claims. (*Id.,* at p. ____ [105 S.Ct. at pp. 1943-1947].) The California statute of limitations for personal injury actions is one year. (Code Civ. Proc., § 340, subd. (3).)

Wilson v. Garcia, supra, was decided several days before plaintiff filed her complaint for section 1983 claims. If that decision applies retroactively to claims based on acts occurring

---

[1] 42 United States Code section 1983.

Unless otherwise indicated, all statutory references are to the United States Code.

before April 17, 1985, the date it was decided, plaintiff's claims are barred.

The court in *Parker v. Superior Court, supra,* 175 Cal.App.3d 1082, 1089, was faced with the same problem of deciding whether the rule of *Wilson v. Garcia* should be applied retroactively or prospectively only. As that court pointed out, the federal courts addressing this retroactivity issue have reached differnet results. However, all of them utilized the test set forth in *Chevron Oil Co. v. Huson* (1971) 404 U.S. 97 in reaching those results. In *Chevron,* the Supreme Court stated that three separate factors must be considered in deciding whether a decision is to be applied retroactively. They are: (1) whether the decision establishes a new principle of law; (2) whether retroactive application will further or retard the purposes of the rule adopted; and (3) whether the decision could produce substantial inequitable results if applied retroactively.

After independently applying these factors to the instant case, we conclude that the one-year limitation period applicable under *Wilson v. Garcia, supra,* should be applied prospectively only so as not to bar real party's claims that were timely under the law in effect when they arose. We have reached this conclusion for the reasons stated in *Parker v. Superior Court, supra,* 175 Cal.App.3d at pages 1089-1091 and *Gibson v. United States, supra,* 781 F.2d at pages 1339-1340.

Rivera v. Green (9th Cir. 1985) 775 F.2d 1381, relied upon by petitioners, is not controlling in this case. The *Rivera* decision that *Wilson v. Garcia* should be retroactively applied to civil rights claims arising in Arizona and to be tried tnere had the effect of extending the statute of limitations. It gave the plaintiff the benefit of Arizona's two-year statute of limitations for personal injury actions, rather than the one-year period previously applicable to civil rights actions. (*Id.,* at p. 1384.) The *Rivera* court emphasized that retroactive application of the *Wilson v. Garcia* rule to civil rights claims in Arizona advanced the litigant's ability to pursue section 1983 remedies at the expense of the disfavored statute of limitations defense. *(Ibid.)* Retroactive application of that rule to real party's civil rights claims would have the opposite effect. (See *Gibson v. United States, supra.*

The writ is denied. Real party shall recover from petitioners her costs (not including attorney's fees) incurred in the proceedings in this court. (*Oksner v. Superior Court* (1964) 229 Cal.App.2d 672.)

/s/ Hamlin, J.

We concur:

/s/ Brown(Geo A), P.J.

/s/ Franson, J.

Appendix C

In the
Court of Appeal of the State of California
in and for the
Fifth Appellate District

F006411
(Super. Ct. No. 327794-4)

County of Fresno, et al.,
Petitioners,

v.

The Superior Court of Fresno County,
Respondent,

Angela Sharon Motsenbocker,
Real Party in Interest.

Order to Show Cause
[Filed Dec. 12, 1985]

To the Superior Court of Fresno County

Good cause appearing, you are required to:

Show cause before this court at its courtroom, 5090 State Building, Fresno, California, on March 17, 1986, at 1:45 p.m., why the relief prayed for in the above entitled matter should not be granted.

Real party in interest shall serve and file a written return on or before December 27, 1985, and petitioners may file a reply thereto on or before January, 10, 1986.

DATED: December 9, 1985

Witness the Honorable George A. Brown, Presiding Justice of the Court of Appeal of the State of California, Fifth Appellate District.

Attest my hand and seal of this court this 9th day of December 1985.

KEVIN A SWANSON, CLERK

By: _____
Deputy Clerk

Appendix D

Law Offices of Bennett & Sharpe
A Professinal Corporation
Barry J. Bennett 67697
Katherine Hart 76715
2300 Tulare Street
Suite 230
Fresno, California 93721
(209) 485-0120
Attorneys for Plaintiff

Superior Court of the State of California
County of Fresno
No. 327794-4

Angela Sharon Motsenbocker,
Plaintiff,

vs.

County of Fresno, Fresno Board of Supervisors, Allan Colman, James Edmunds, Donald Rowe, Don Cobb and Does 1 through XX, inclusive, Defendants.

[Filed 10/14/85]

DECISION AND ORDER

Defendant, County of Fresno, filed a demurrer to Plaintiff Motsenbocker's complaint in which County argued that the statute of limitations precluded plaintiff's complaint. Ms. Katherine Hart appeared on behalf of Plaintiff and Mr. Mark Lester appeared on behalf of Defendant. Following oral argument, the matter was submitted to Judge Dwayne Keyes for decision.

Upon due consideration of the written and oral arguments advanced by the parties, the Court enters its order overruling Defendants' demurrer.

Dated: , 1985.

Dwayne Keyes
Judge of the Superior Court

Supreme Court, U.S.
FILED
NOV 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-570

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

COUNTY OF FRESNO, FRESNO COUNTY BOARD OF SUPERVISORS, ALLAN COLMAN, JAMES EDMUNDS, DONALD ROWE and DONN COBB,
Petitioners,

VS.

SUPERIOR COURT OF THE COUNTY OF FRESNO,
Respondent,
ANGELA SHARON MOTSENBOCKER,
Real Party in Interest.

On Petition for a Writ of Certiorari to the Supreme Court of California

Brief of Real Party in Interest In Opposition to Petition for Writ of Certiorari

BARRY J. BENNETT
KATHERINE HART
JOBY DUPUIS
LAW OFFICES OF
BENNETT & SHARPE
2300 Tulare Street
Suite 230
Fresno, CA 93721
Attorneys for
Real Party in Interest

35pp

QUESTIONS PRESENTED

Did the state appellate court correctly rule that, under the standards set forth in Chevron Oil Company v. Huson (1971) 404 U.S. 97, the United States Supreme Court decision in Wilson v. Garcia (1985) 105 S. Ct. 1938, 85 L. Ed. 2d 254, mandating that the statute of limitations for personal injury actions in each state be the applicable statute of limitations for all Section 1983 Civil Rights claims nationwide, should be applied prospectively in California?

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Real Party in Interest ANGELA SHARON MOTSENBOCKER respectfully submits her opposition to the pending Petition for Writ of Certiorari in the above captioned action.

OPINIONS BELOW AND JURISDICTION

Real Party in Interest ANGELA SHARON MOTSENBOCKER agrees with Petitioners' reference to the Opinions below, and to their jurisdictional statement.

STATUTES INVOLVED

In addition to the statutes referenced in the Petition, this matter involved 42 U.S.C. Section 1983 and 1988 as set forth in Appendix A, attached hereto.

REAL PARTY IN INTEREST'S STATEMENT OF THE CASE

On April 23, 1985, Real Party in Interest, ANGELA SHARON MOTSENBOCKER (Motsenbocker), filed her State Court Com-

plaint alleging two causes of action. Both causes of action seek relief under 42 U.S.C. Section 1983 for conduct alleged to have occurred between July 1, 1982 and August 9, 1983. The first cause of action alleges that petitioners conspired and did wrongfully terminate Motsenbocker from her employment with petitioner Fresno County. The second cause of action alleges that petitioners Colman, Rowe, Cobb and Edmunds engaged in an outrageous and concerted course of conduct intended to force Motsenbocker to leave her employment with petitioner Fresno County, and to harass, humiliate, and intimidate Motsenbocker.

Petitioners filed and served on Motsenbocker a demurrer to the complaint on July 27, 1985. The demurrer challenged the timeliness of the complaint, alleging that

the complaint was barred by the personal injury statute of limitations period application to Section 1983 actions (one year in California), announced by the Supreme Court in Wilson v. Garcia (1985) __ U.S. __, 105 S. Ct. 1938, 85 L. Ed. 2d 254, decided several days before the complaint was filed. Opposition to the demurrer was filed and served on August 9, 1985. Petitioners' reply was filed and served on September 20, 1985 and a hearing on the demurrer was held on September 24, 1985 before The Honorable Dwayne Keyes. Judge Keyes overruled the demurrer on that date and his written order was filed on October 14, 1985.

On November 20, 1985, Petitioners filed a timely Petition for Writ of Mandamus, Prohibition or other appropriate writ and supporting papers with the California State

Court of Appeal for the Fifth Appellate District. Petitioners prayed for issuance of an Alternative writ of Mandamus, Prohibition, and/or other appropriate writ commanding Respondent State of California Superior Court, County of Fresno to vacate its order overruling the demurrer and to enter an order granting the demurrer dismissing the complaint as untimely, or in the alternative, to show cause why it had not done so and why a peremptory writ should not issue, and for other further relief.

On December 9, 1985, Motsenbocker served its opposition to the Petition for Writ. On December 9, 1985, the Court of Appeal issued an order to show cause which was filed on December 12, 1985. Petitioners' reply was filed and served on January 9, 1986. Oral arguments were heard on March 17, 1986.

The Court of Appeal filed its written opinion denying Petitioners' Writ and ordered that Motsenbocker recover her costs incurred in the proceedings on the writ from petitioners on April 4, 1986. The Court of Appeal held that "the one-year limitation period applicable under Wilson v. Garcia, supra, should be applied prospectively only so as not to bar Real Party's claims that were timely under the law in effect when they arose."

Petitioner sought review of the Appellate Court's decision on May 13, 1986 by filing a timely petition to the Supreme Court of the State of California to review the judgment and decision of the Fifth Appellate District. Motsenbocker filed her opposition to the Petition on May 22, 1986. Petitioners' Petition for Review was denied

on July 9, 1986 when the Supreme Court of the State of California filed and served its order denying review.

Motsenbocker received petitioners' Writ for Certiorari filed with this Court on October 8, 1986. The instant opposition followed.

REASONS FOR DENYING THE WRIT

I. ANY CONFLICT EXISTING REGARDING WHETHER THE UNITED STATES SUPREME COURT DECISION OF WILSON V. GARCIA SHOULD HAVE RETROACTIVE EFFECT DOES NOT INVOLVE IMPORTANT QUESTIONS OF FEDERAL LAW

Contrary to petitioners' assertion there is no nationwide controversy as to whether the United States Supreme Court decision in Wilson v. Garcia (1985) 105 S. Ct. 1938, 85 L.Ed. 2d 254 should be given a carte blanc retroactive effect. All circuits addressing the issue thus far have uniformly held that the retroactive effect of this

Court's decision in Wilson must be determined by applying the standards set forth by this Court in Chevron Oil Company v. Huson (1971) 404 U.S. 97, 92 S. Ct. 349, 30 L.Ed. 2d 296. The different conclusions reached by the various circuits are not the result of the application of differing legal principles or unanswered questions of federal law. Instead, the various results stem from the status of the law surrounding the applicable statute of limitations period in civil rights actions brought pursuant to 42 U.S.C. Section 1983 within the particular circuit prior to the announcement of the Wilson decision.

Petitioners mischaracterize the intent of the Supreme Court in deciding Wilson with respect to establishing a nationwide uniform statute of limitations period for Section 1983 actions.

The Court did not establish a nationwide statute of limitations period. Instead, the Court sought to insure that in each state there would be but one statute of limitations period for actions brought under Section 1983. Specifically the Court stated that:

> Although the need for national uniformity "has not been held to warrant the displacement of state statutes of limitations for civil rights actions" (citation omitted), uniformity within each state is entirely consistent with the borrowing principle contained in Section 1988. We conclude that the statute is fairly construed as a directive to select, in each state, the one most appropriate statute of limitations for all Section 1983 claims. The federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach. (Emphasis added.)

Wilson v. Garcia, supra, 105 S. Ct. at 1947. Thus, the Supreme Court, in order to insure that but one limitations period be identified

in each state as applicable to Section 1983 claims, undertook the task of characterizing the nature of a Section 1983 claim. After reasoned consideration of many possible characterizations, the Court held that all Section 1983 claims brought nationwide are to be characterized as personal injury actions for the purpose of determining which state statute of limitations period is to apply. Wilson v. Garcia, supra, 105 S. Ct. at 1947. The Wilson decision overruled the existing law in California and in the Ninth Circuit, not because Wilson established that only one state limitations period was applicable to Section 1983 actions, but because Wilson characterized the nature of Section 1983 actions as personal injury actions, whereas both California and the Ninth Circuit had previously held that the nature of Section 1983

actions was that of actions brought upon a liability created by statute. Smith v. Cremins (9th Cir. 1962) 308 F.2d 187; Donovan v. Reinbold (9th Cir. 1970) 433 F.2d 738; Mills v. Small (9th Cir. 1971) 446 F.2d 249; Rossiter v. Benoit (1979) 88 Cal. App. 3d 706, 152 Cal. Rptr. 65.

Under the current law established by Wilson, the actual period of limitations varies from state to state. In California, and in Ohio, a plaintiff must file suit within one year of the injury. Gibson v. United States (9th Cir. 1986) 781 F.2d 133; Mulligan v. Hazard (6th Cir. 1986) 777 F.2d 340. In Arizona and Iowa, the same plaintiff must file within two years. Rivera v. Green (9th Cir. 1985) 775 F.2d 1381; Wycoff v. Menke (8th Cir. 1985) 773 F.2d 983. In Mississippi, the plaintiff must file within

one year in Alabama, within six years, and, in Pennsylvania, within two years. Gates v. Spinks (5th Cir. 1985) 771 F.2d 916; Smith v. City of Pittsburg (3rd Cir. 1985) 764 F.2d 188; Jones v. Preuitt & Mauldin (11th Cir. 1985) 763 F.2d 1250. In New Mexico, a Section 1983 action must be filed within three years. Jackson v. City of Bloomfield (10th Cir. 1984) 731 F.2d 652. Thus, there is nothing uniform about the limitations period being applied to Section 1983 actions nationwide. Likewise, the effect of the Wilson decision varies from state to state. In some instances, the decision lengthened the limitations period and, in some, it shortened the period. More importantly, in some states it established one limitations period where, before, there had been more than one limitations period applicable to Section 1983

actions. (See authorities cited above). Thus, contrary to petitioners' assertion, whether or not Wilson is applied retroactively or prospectively, there will not be a uniform statute of limitations period nationwide.

This Court has set forth a three-prong analysis to be applied in determining whether or not a newly-formulated rule of law should be applied retroactively to bar an action in Chevron Oil Company v. Huson, supra. The principles set forth in Chevron are as follows: "(1) whether the decision establishes a new principle of law; (2) whether retroactive application will further or retard the purposes of the rule in question; and (3) whether applying the new decision will produce substantial inequitable results." Barina v. Gulf Trading & Transp. Co. (9th

Cir. 1984) 726 F.2d 560, 563 (applying Chevron). Thus, this Court has previously held that to determine whether or not a decision is to be applied retroactively requires a balancing of the above enumerated factors in order to protect against substantially inequitable results and to further the purpose of the rule in question. Petitioners, in their Petition, recognize the validity of the Chevron standards which have been consistently utilized where changes in statutes of limitations are at issue. See: Jackson v. City of Bloomfield, supra; Occhino v. United States (8th Cir. 1982) 686 F.2d 1302; Fernandez v. Chardon (1st Cir. 1982) 681 F.2d 42, aff on other grds 103 S. Ct. 2611; Singer v. Flying Tiger Line, Inc. (9th Cir. 1981) 652 F.2d 1349.

In summary, there is no important ques-

tion of federal law to be answered which would justify the granting of the instant Petition for Writ of Certiorari. Under well accepted principles of federal law, and pronouncement of this Court, the retroactivity of a newly announced rule is to be determined under a Chevron analysis.

II. UNDER THE PRINCIPLES SET FORTH IN CHEVRON OIL CO. V. HUSON, THE SUPREME COURT'S DECISION IN WILSON V. GARCIA SHOULD NOT BE APPLIED RETROACTIVELY TO BAR REAL PARTY IN INTEREST'S CLAIM

The first and most important factor of the Chevron analysis is whether the decision in question establishes a new principle of law. Contrary to petitioners' contention, this first factor is not limited to determining whether or not there exists a clear past precedent of the United States Supreme Court which has been overruled, but instead whether there exists clear precedent "upon which a

plaintiff may rely." Jackson v. City of Bloomfield, supra; Abbitt v. Franklin (10th Cir. 1984) 731 F.2d 661; Smith v. City of Pittsburg, supra; Fitzgerald v. Larson, (3d Cir. 1985) 769 F.2d 160.

There can be no question that prior to the Wilson v. Garcia decision, the law in California was well settled. Unlike the circuits and states which applied one of several statute of limitations period to Section 1983 actions, depending of the nature of the claims underlying the complaint, in California there was but one statute of limitations period applied to all Sections 1983 actions. Parker v. Superior Court, supra; Gibson v. United States, supra; Donovan v. Reinbold, supra; Rossiter v. Benoit, supra. As stated above, this Court's decision in Wilson overruled clear precedent in

California and in the Ninth Circuit characterizing Section 1983 actions as actions based on a liability created by statute. Prior to Wilson, potential litigants in California relied on the long settled rule that Section 1983 actions must be filed within three years. Thus, the first Chevron factor weighs heavily in favor of prospective application.

It is important to note that in all of the cases cited by petitioners as having held Wilson retroactive, there was a finding that there existed no pre-existing precedent upon which the plaintiff could have relied which would have allowed the suit as timely, where Wilson would not. Jones v. Preuitt v. Mauldin (11th Cir. 1985) 763 F.2d 1250; Gates v. Spinks, supra; Wycoff v. Menke, supra; Smith v. City of Pittsburg, supra; Mulligan v. Hazara, supra; Fitzgerald v. Larson,

supra.

The second factor in Chevron also weighs in favor of prospective application. As stated above, the purpose and intent of the newly adopted rule in Wilson is to insure that there is intra-state uniformity and certainty in Section 1983 actions, with each state applying one statute of limitations period. Wilson v. Garcia, supra 105 S. Ct. at 1947; Jones v. Preuitt & Mauldin, supra. Because the Ninth Circuit and California applied only one limitations period prior to Wilson, the purpose of this Court's decision in Wilson is furthered regardless of whether Wilson is applied prospectively or retroactively. There has always been one statute of limitations in California applicable to Section 1983 actions. In other circuits prospective application of Wilson would leave

cases pending in which useless litigation on the collateral matter of the nature of the claim must still be decided. This is not so in the instant case.

It is above described type of multiple collateral litigation that the Wilson decision seeks to eliminate, not Section 1983 actions in and of themselves, as petitioners would have the Court believe. In addition to the need for intra-state uniformity, the Wilson decision recognizes the high purposes of the unique remedy created by the statute and the necessity of giving the statute as broad a sweep as possible in order to insure the widest possible availability of the remedy. Wilson v. Garcia, supra, 105 S. Ct. at 1945.

Thus, for the above stated reasons, the second factor also supports the state

appellate Court's finding that Wilson should be given prospective application in California.

The third factor of the Chevron analysis is intricately tied to the first, which as already stated, weighs heavily in favor of prospective application. The Third Circuit in Fitzgerald v. Larson, supra. stated that it would be inequitable to give retrospective application to a newly established shorter time period that altered prior law upon which a plaintiff could have reasonably relied. However, in Fitzgerald, the court went on to find that there had been no established law in the Third Circuit prior to Wilson v. Garcia, supra. which warranted reliance and, thus, concluded that in the Third Circuit it would not be inequitable to hold Wilson retroactive. Such is not the case, however, in

the Ninth Circuit. Since Wilson overruled clear past precedent holding the statute of limitations to be three years, it would be inequitable to shorten the time period so as to bar Motsenbocker's claim. Motsenbocker reasonably relied on clear California Supreme Court and Ninth Circuit authority, given the absence of the pronouncement on the issue by this Court, in waiting to file her Section 1983 lawsuit. Donovan v. Reinbold, supra; Rossiter v. Benoit, supra. When the Wilson decision was announced, Motsenbocker immediately filed her complaint.

The Ninth Circuit's approach to circumstances such as these, where the effect of a recently promulgated rule of law varies from state of state within the circuit depending on the prior status of the law in that state, is equitable and is intended to

preserve a litigant's access to important remedies. In the Ninth Circuit, when a new rule of law increases the limitations period, as in Rivera v. Green, supra., the rule is given retroactive effect thereby opening doors for plaintiffs who might otherwise be denied their day in court. On the other hand, if the new rule would act to shorten the limitations period, as in the instant case, Gibson v. U.S., supra., and Parker v. Superior Court, supra., the rule is given prospective effect so as not to deny a party his/her day in court when there had been reasonable reliance on established law. Moreover, a defendant cannot be prejudiced by enforcing the limitations rule prevailing at the time of a defendant's alleged wrongful acts. Gibson v. United States, supra. 781 F.2d at 1339. This approach would prevent

the scenario which petitioners suggest in their Petition at page 8, regarding the DeVargas v. New Mexico (1982) 97 NM 563 decision. Under the Ninth Circuit rule, DeVargas would have his day in court.

The approach defined above is not only equitable under the Chevron standards, but has successfully been utilized in the Ninth Circuit when a similar ruling by this Court established a new rule concerning the applicable time period in suits brought under section 301 of the Labor Management Relations Act, 29 U.S.C. Section 151 et seq. DelCostello v. International Brotherhood of Teamsters (1983) 462 U.S. 151, 103 S. Ct. 2281; Glover v. United Groceries, Inc. (9th Cir. 1984) 746 F.2d 1380 cert den. 105 S. Ct. 2357.

CONCLUSION

The questions presented by petitioners do not involve important questions of federal law or require that this Court establish a nationwide rule with regard to the retroactivity of its decision in Wilson v. Garcia, supra. The effect of Wilson varied from state to state and circuit to circuit depending on what the status of the law was in each jurisdiction prior to Wilson. Thus, a nationwide rule concerning retroactivity would be difficult to formulate, and inevitably inequitable. The standard to be used in determining whether a newly announced rule of law should be given retroactive or prospective effect is well settled and set forth in Chevron Oil Company v. Huson, supra. The Ninth Circuit's approach, as adopted by the State Court of Appeals in the instant

case, is well reasoned, in compliance with the Chevron standards, and consistent with the purpose and intent of Wilson.

For all of the reasons stated above, the Petition for a Writ of Certiorari should be denied.

DATED: November 3, 1986

Respectfully submitted,

LAW OFFICES OF
BENNETT & SHARPE

By _____
BARRY J. BENNETT
(Counsel of Record)

By _____
JOBY DUPUIS

By _____
KATHERINE HART
Attorneys for Real Party in Interest ANGELA SHARON MOTSENBOCKER

APPENDIX A

CODE SECTIONS 42 U.S.C. 1988 and 1983

42 U.S.C. Section 1988

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of [the civil rights statutes]...shall be exercised and enforced in conformity with the laws of the United States...; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the Untied States, shall be extended to and govern the said courts in the trial and disposition of the cause...

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CERTIFICATE OF SERVICE BY MAIL

I, the undersigned, certify as follows:

I am a citizen of the United States of America, a resident of the County of Fresno, State of California, over the age of eighteen years, and not a party to the within entitled cause or matter. My business address is 2300 Tulare Street, Suite 230, Fresno, California 93721.

On November ____, 1986 I served the foregoing Brief of Real Party in Interest in Opposition to Petition for Writ of Certiorari by depositing true copies thereof in the United States Post Office mail box at Fresno, California, enclosed in sealed envelopes, with postage thereon fully prepaid, addressed

as follows:

Frank D. Maul, Counsel of Record
Daniel O. Jamison
Michael P. Mallery
2011 Fresno Street, Suite 305
Fresno, California 93721-1979

I certify under penalty of perjury that the foregoing is true and correct.

Executed at Fresno, California, on November ____, 1986.

_____